

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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United States of America,	)	File No. 20-cr-291(1)(2)
	)	(DSD/DTS)
Plaintiff,	)	
	)	
v.	)	
	)	
Gregory Carl Koch(1),	)	Courtroom 9W
Jerome David Kangas(2),	)	Minneapolis, Minnesota
	)	Thursday, May 6, 2021
Defendants.	)	9:05 a.m.
	)	

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BEFORE THE HONORABLE DAVID T. SCHULTZ  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**MOTIONS HEARING**

APPEARANCES

For the Plaintiff:	UNITED STATES ATTORNEY'S OFFICE BY: MICHELLE E. JONES 300 South Fourth Street, #600 Minneapolis, Minnesota 55415
For the Defendant Gregory Carl Koch (1):	LAW OFFICES OF PAUL ENGH BY: PAUL C. ENGH 650 Third Avenue South, #260 Minneapolis, Minnesota 55402
For the Defendant Jerome David Kangas(2):	JOSEPH S. FRIEDBERG CHARTERED BY: JOSEPH S. FRIEDBERG 701 Fourth Avenue South, #300 Minneapolis, Minnesota 55415
	PACYGA AND ASSOCIATES PA BY: RYAN M. PACYGA 333 South Seventh Street, #2850 Minneapolis, Minnesota 55402
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Transcript produced by computer.

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**P R O C E E D I N G S**

**IN OPEN COURT**

THE COURT: All right. We are on the record in the matter of the United States versus Gregory Carl Koch and Jerome David Kangas, Criminal No. 20-291.

Counsel for the defendants, if you will note your appearances for the record, please.

MR. ENGH: Paul Engh on behalf of Mr. Koch. He's here with me, Your Honor. Good morning.

THE COURT: Good morning, Mr. Engh.

And counsel for Mr. Kangas.

MR. PACYGA: Good morning, Your Honor. Ryan Pacyga and Joe Friedberg for Mr. Kangas, who is here out of custody.

THE COURT: Good morning, Mr. Friedberg and Mr. Pacyga.

Counsel for the government.

MS. JONES: Good morning, Your Honor. Michelle Jones on behalf of the United States.

THE COURT: All right. Good morning, Ms. Jones.

So, as I understand it, first order of business is we need to arraign Mr. Kangas; is that correct?

MR. PACYGA: That's my understanding.

THE COURT: Come on up here, if you will.

All right. Good morning, Mr. Kangas.

1 DEFENDANT KANGAS: Good morning.

2 THE COURT: An indictment -- well, first, would  
3 you state your full name and spell your last name for the  
4 record, please?

5 DEFENDANT KANGAS: Jerome David Kangas,  
6 K-A-N-G-A-S.

7 THE COURT: And what is your date of birth?

8 THE DEFENDANT: 4/17/64.

9 THE COURT: All right. Mr. Kangas, an indictment  
10 dated December 17th of 2020 has been filed against you  
11 charging you with five counts of mail fraud in connection  
12 with an alleged health care fraud scheme. Have you had an  
13 opportunity to review the indictment?

14 DEFENDANT KANGAS: Yes.

15 THE COURT: Mr. Pacyga or Mr. Friedberg, do you  
16 wish to waive the reading of the indictment?

17 MR. PACYGA: We will waive the reading and ask  
18 that not guilty pleas be entered for the counts, Your Honor.

19 THE COURT: All right. A not guilty plea to all  
20 counts of the indictment will be entered on your behalf,  
21 Mr. Kangas.

22 I believe that you have the dates already by  
23 virtue of Mr. Koch's indictment order or his arraignment  
24 order -- excuse me -- but, regardless, I'm not going to give  
25 you -- I'm not going to read off a bunch of dates this

1 morning. We will get those to you if you don't have them.  
2 Okay?

3 MR. PACYGA: Okay. Understand. Thank you.

4 THE COURT: Okay. Thank you.

5 DEFENDANT KANGAS: Thank you, Your Honor.

6 THE COURT: So, as I understand it, we have a  
7 number of motions. I am assuming that what we have for  
8 argument is the bill of particulars and the in-camera  
9 inspection motions; is that correct? Am I assuming that  
10 correctly?

11 MR. ENGH: And *Brady*.

12 THE COURT: And *Brady*?

13 MR. ENGH: And we would like to talk about *Jencks*  
14 for a paragraph.

15 THE COURT: Okay. Who will be arguing on the  
16 defendants' behalf?

17 MR. ENGH: I will be.

18 THE COURT: All right. Go ahead.

19 MR. ENGH: Do you want me to stand up or should  
20 I -- what's the protocol here?

21 THE COURT: What's that?

22 MR. ENGH: What's the protocol? Can I stand up?

23 THE COURT: Yes, you may. And, yeah, go ahead and  
24 push one microphone out of your way. And go ahead.

25 MR. ENGH: Should I keep my mask on? Is that how

1 we're doing this? It's up to you.

2 THE COURT: Yeah, I guess we are.

3 MR. ENGH: Okay. Well, thank you for the motion  
4 hearing. This is a fascinating case for the court and for  
5 the defense, and I'd like to start by introducing the case  
6 to you to provide a context for why we are moving for what  
7 we're moving for. It goes a little bit beyond the  
8 indictment.

9 This is a case that didn't originate with the  
10 government. It was an investigation that was conducted  
11 internally by Park Nicollet Clinic, which is owned by  
12 HealthPartners, and it involves Mr. Kangas who supplied  
13 telephone access to patients at Park Nicollet who were on  
14 the CPAP machines. Mr. Koch was his supervisor and in  
15 charge of some of the retail sales involved here.

16 They're taking the position, the government is, on  
17 behalf essentially of a corporation and sitting in the shoes  
18 of a corporation. They are attempting to secure restitution  
19 of a claim of \$500,000, \$300,000 of which was paid by Park  
20 Nicollet's insurance company and \$200,000, plus a little  
21 change, was the deductible. And so they've relied, in our  
22 view, for the disclosures largely on what's coming from Park  
23 Nicollet and the emails, such as they are, the contracts,  
24 such as they are. And so their theory is that Mr. Kangas  
25 engaged in a rip-off of Park Nicollet in that he didn't

1 provide the services and was paid \$500,000 and should give  
2 back every cent of that pay. Our theory is that he did  
3 provide services, agreed-upon services on a 24/7 basis per  
4 his contract and was paid accordingly fairly an agreed-upon  
5 rate by Park Nicollet.

6 Mr. Koch for his part approved Mr. Kangas' request  
7 for pay, but got nothing else back. There is no evidence of  
8 a kickback or an exchange of money between the two. Their  
9 relationship is at best a friendship, and they are not  
10 terribly close. And so there's nothing -- there's no  
11 exchange of money, but that's a bill of particulars motion  
12 that I want to get to.

13 So we have a situation here that is a private  
14 company.

15 THE COURT: Hang on one second, just -- at least  
16 as I understand it, the general allegation is Mr. Kangas  
17 billed for time not actually working in the amount of  
18 38,000 hours over a period of five or six years. Is that --  
19 is that the general allegation?

20 MR. ENGH: That's the general allegation, and we  
21 dispute that.

22 THE COURT: Yeah.

23 MR. ENGH: So if he --

24 THE COURT: 38,000 hours is a lot of hours.

25 MR. ENGH: Well, if you're on call 24/7 and you

1 can bill for a number of hours per call, which is one of our  
2 disputes here, then it's not.

3 And in the context of the case Park Nicollet was  
4 delighted to have someone like Mr. Kangas handle these  
5 calls. They had a problem. They had a structural problem  
6 in the company in that they sold these CPAP machines and  
7 they didn't have enough people to service them at night when  
8 they collapsed or, you know, some elderly person couldn't  
9 turn on the switch. That sort of thing happens. And so  
10 they needed someone who would be willing to be on call all  
11 the time, 24/7. And they had huge problems internally  
12 staffing that, and they were delighted to get Mr. Kangas.  
13 I'm not his lawyer, but they were happy to get him and put  
14 him under contract, so they could solve a structural problem  
15 they had at the clinic and that is to address the CPAP  
16 customers. It was a service that the clinic did provide,  
17 and he provided it.

18 If he provided the service, there is a set-off  
19 required in the law which mitigates the loss that they are  
20 claiming. They are claiming it's a total loss. If he did  
21 supply the services, then it's a set-off to that loss. In  
22 our view, he supplied all the services that were required  
23 and there's no loss whatsoever, but that's what the fight is  
24 going to be about. And the government claims, well, there's  
25 no set-off whatsoever, it's not a health care fraud case.

1 But this district has had trouble when -- the district court  
2 has had trouble in the Eighth Circuit when it doesn't apply  
3 a set-off. And that's one of the reasons for our *Brady* and  
4 discovery motions.

5 So that is the context of the case. It's a  
6 private lawsuit, which should have been sued privately,  
7 frankly, but now I interrupt. Go ahead. I'm all excited.  
8 I haven't got to the main thing yet, so --

9 THE COURT: Yeah, yeah, yeah. So run that by me  
10 again, about the set-off. Okay? I'm not sure I follow  
11 that. Do it again.

12 MR. ENGH: If you --

13 THE COURT: He goes -- Kangas goes, services the  
14 CPAP machine, bills an hour for whatever service he  
15 provided. What's the set-off? Where does that fit in?

16 MR. ENGH: He has -- he has provided the service  
17 as agreed upon between him and Park Nicollet. Okay? So  
18 they can't claim a total loss. If he provides -- if he does  
19 what they say they want him to do, they haven't lost  
20 \$500,000.

21 THE COURT: Right.

22 MR. ENGH: And that's the set-off.

23 It's the same kind of idea on bank loans. If you  
24 take a bank loan by fraud and keep the loan for a number of  
25 years, the loss is the total loan; but if you take the loan



1 and it's collateralized and the bank gets the collateral  
2 back immediately, then there is such a thing as a set-off.  
3 And that's *United States versus Shevi*, S-H-E-V-I. And  
4 that's not even a health care fraud case. That's just an  
5 ordinary mail fraud case.

6 THE COURT: Well, I guess what confuses me about  
7 what you are saying, and it probably doesn't matter for  
8 today's purposes, but maybe it does, is why is that a  
9 set-off at all as opposed to "I did this thing, I billed  
10 you, you paid me." What's the set-off?

11 MR. ENGH: Well, they're claiming that --

12 THE COURT: Isn't your argument there's no loss?

13 MR. ENGH: Well, they're claiming an excessive  
14 billing essentially.

15 THE COURT: No, I know, but you are saying it  
16 wasn't excessive at all --

17 MR. ENGH: No.

18 THE COURT: -- because I did the thing, I billed  
19 you for the hour --

20 MR. ENGH: Right.

21 THE COURT: -- or whatever, you paid me for the  
22 hour. We don't have to figure out if, you know -- if I  
23 billed appropriately, the amount of the loss is zero.

24 MR. ENGH: Right, but then the middle ground is  
25 always what is the exact loss. And so then you become

1 engaged in a Solomonic endeavor of saying what is the loss  
2 here. And so anything that we can do to mitigate the loss  
3 mitigates the guidelines.

4 THE COURT: Sure.

5 MR. ENGH: And that impacts *Brady*.

6 THE COURT: Right.

7 MR. ENGH: So that's why it's all very -- that's  
8 why the whole milieu matters a great deal here.

9 THE COURT: Okay.

10 MR. ENGH: So with that context in mind, let me  
11 address briefly why we filed the motions we did -- they are  
12 customized to this case -- and why you should grant them  
13 paragraph by paragraph, rather than just the ordinary the  
14 government will supply Rule 16, the government will supply  
15 *Brady*. We want a little more specificity here for the court  
16 to help us with the documentation we need to defend these  
17 two guys, who are looking at prison terms.

18 So in terms of the discovery provided thus far, I  
19 have no doubt that Ms. Jones gave us what she has. She  
20 indicates that she has. I take her for her word, of course.  
21 I've known her for many years. But there's more there.  
22 There has to be more there.

23 One of the things we've asked for -- and I want to  
24 make a record of this. I don't want to be pedantic with  
25 you, but, number one, I want the emails from Mr. Koch's

1 business account. These are statements, in our view, within  
2 the meaning of Rule 16. They are in the possession of the  
3 victim, who the government represents.

4 We would really like, number three, Mr. Kangas'  
5 evaluations for 2013 and 2014. These are business records  
6 that should be with Park Nicollet, but were not disclosed by  
7 Ms. Jones and her office. It's really important we get  
8 these not only for Mr. Kangas, but for Mr. Koch.

9 For example, in 2015 Mr. Kangas' evaluation says,  
10 quotes, Jerry did a great job in helping interview clients  
11 and getting the patients set up. He has done a great job  
12 taking calls for patients, received many compliments from  
13 patients on how nice he is to work with. It confirms he's  
14 working, he's doing what he's supposed to do. The earlier  
15 evaluations will say the same thing. This will be potent  
16 evidence for us and the jury. The 2016 evaluation --

17 That's Bates stamp 239, counsel.

18 The 2016 evaluation says, quote, Jerry did a nice  
19 job this year taking care of patients. His comment cards  
20 have an approval rate, I paraphrase, of 95 percent.  
21 Patients have found you to be, quotes, kind and patient with  
22 them. You did a great job answering the phones. He  
23 provides, according to the government's discovery,  
24 24-hour-a-day service.

25 And so we want those two evaluations. That's

1       Brady, clearly.

2               THE COURT: I suspect that the fighting issue is  
3 going to be, at least from the government's perspective, not  
4 that this isn't relevant and discoverable information, but  
5 that they don't have it.

6               MR. ENGH: Well, I would like -- you know, that is  
7 their response. I must say I disagree. They are  
8 representing this company. They are basically in the shoes  
9 of the company. I would like leave of the court to address  
10 that in writing, because this comes up all the time. They  
11 are starting to represent these private companies. Oh, I  
12 don't have it, you go ahead and subpoena it, and then you  
13 work for it, when I can get it with a phone call, that kind  
14 of thing. So I would like leave of the court to brief that  
15 particular issue, if you are willing to let me do it. Okay.

16              THE COURT: Keep going.

17              MR. ENGH: We would like all employment contracts.  
18 There's one we saw that's abbreviated. In our view, the  
19 management was aware of the compensation system that was  
20 developed and the protocols developed for Mr. Kangas. And  
21 so we want evidence of oral and written materials that  
22 confirm he could bill at \$120 per call, which he did. So  
23 whether the call was under an hour or 20 minutes or two  
24 hours, he can bill \$120. And that's how you get -- that's  
25 how you get to the 38,000 hours. We want that.

1           You know, what happened there is in Park Nicollet  
2           they had budgetary meetings all the time, every two weeks,  
3           and every year they figured out whose salary was going to be  
4           what, who is going to get paid, whether they got a raise or  
5           not. And Park Nicollet was well aware of how much he made,  
6           and they approved how much he made every year, but we don't  
7           have those documents, but we have -- you know, Mr. Koch is  
8           not the only guy there. He's sort of a lower-level manager.  
9           This is a large organization with budgetary constraints, and  
10          they paid him. It's almost -- I mean, it's hard to complain  
11          about what he made when you approved all his money, if you  
12          ask us, but that may be a matter for trial, you know.

13           THE COURT: Well, they're going to say, yeah, we  
14          approved it because we didn't realize he was fraudulently  
15          billing us.

16           MR. ENGH: Well --

17           THE COURT: That's what they'll say.

18           MR. ENGH: Well, I appreciate that, and that's why  
19          we have trials.

20           THE COURT: Right.

21           MR. ENGH: But we also need the data to prove our  
22          case, so that's why I'm asking.

23           THE COURT: Yep.

24           MR. ENGH: I would like on expert witness  
25          disclosure 60 days in advance. You know, we believe this is

1 almost a -- could be considered or designated a complex  
2 case, but we haven't made a motion to that effect, but they  
3 are offering 21 days, and we will be naked as it were  
4 without an expert if we get it 21 days beforehand.

5 So that's what I have on discovery. I'd like to  
6 move to *Brady*, if the court is willing.

7 THE COURT: Yep.

8 MR. ENGH: Okay. This is related to discovery.  
9 This is related to the in-camera review, but we would like  
10 evidence that the patients were treated by Mr. Kangas. This  
11 proves that he was working, and it disproves the  
12 deeply-flawed government theory that he deserved nothing.  
13 These are not imaginary patients. The time spent was not  
14 imaginary. And it has to be disclosed just because it's  
15 relevant evidence, it's *Brady* evidence, and it's a set-off  
16 type evidence as well under *Luna*.

17 THE COURT: Hang on one second. Two things.

18 First of all, are you able to keep up with him?

19 COURT REPORTER: Yes.

20 THE COURT: Okay. Slow down a little bit.

21 MR. ENGH: Okay.

22 THE COURT: Second, if we're talking an allegation  
23 of 38,000 hours of overbilling, we're talking how many  
24 patients he -- and are you asking that I review in camera  
25 the medical records of thousands of patients?

1 MR. ENGH: Well, it's tempting to ask you that,  
2 and I did in my motion, but here's what --

3 THE COURT: Maybe for you.

4 MR. ENGH: But here's -- the defense had this  
5 exact conversation yesterday in a meeting. And what we  
6 propose -- Mr. Pacyga can supplement this -- is that you  
7 limit the in-camera review to the time frame of the  
8 indictment or the counts in the indictment, for example, or  
9 ask for 20 or 30 patients of his and start there. It would  
10 be the bank examiner technique. You have a hundred loans;  
11 you look at one to see if the bank protocol is correct; and  
12 then you assume the protocol is correct for the rest of  
13 them. So I would suggest that -- and I will brief this for  
14 you -- that we narrow this down to the time frames of the  
15 pay periods that he was paid for and the customers that he  
16 treated. And I think that would provide the court with a  
17 reasonable world as it were to look at. And we would be  
18 willing to do that.

19 THE COURT: Let me jump ahead on that issue. I  
20 had a -- I have a rather contentious False Claims Act case  
21 in which I told the government that if they're going to  
22 prove, you know, however many kickbacks, which was that  
23 case, they weren't going to do it on statistical sampling,  
24 they were going to prove each and every one, and they had to  
25 do that.

1           Are you -- I guess implicit in what you are  
2           arguing is, at least perhaps a suggestion, that you're  
3           agreeing to do this by way of statistical sampling somehow.  
4           Am I tracking or is this -- does it matter, in other words,  
5           for this motion what the proof is going to be at trial?

6           MR. ENGH: Well, I think you're ahead of me on  
7           this one. I mean, we just want --

8           THE COURT: You want to start by seeing.

9           MR. ENGH: Our thinking was just get -- you know,  
10          have you review it; and if you think it is relevant and  
11          material under *Ritchie*, give it to us; and then we will  
12          decide whether we have a revisit with you or maybe it is  
13          sufficient. Without seeing it, it's hard to say. We could  
14          provide a statistical analysis, but that's a little more  
15          sophisticated than we're considering right now. And we're  
16          bread and butter right here. We just want to show that  
17          patients were really happy with them and they got service.  
18          And we want to call ten patients at trial, it would be very  
19          powerful evidence, if we can reach them; and the only way we  
20          can reach them is if you tell us through a review who they  
21          are.

22          THE COURT: Okay. All right. Keep going.

23          MR. ENGH: We've asked for a grand jury  
24          transcript, which describes the loss of \$500,000 in error.  
25          In our view, this will be used for impeachment.



1           We've asked for the Kangas employment contract,  
2           oral or written, assuring that he would be paid \$120 on each  
3           call. We don't have that in the discovery.

4           His employment app evaluations. I've talked  
5           about.

6           I've also talked about No. 5, Park Nicollet's  
7           knowledge of his work, his pay, who made the decisions to  
8           pay him, because they did. They approved his pay.

9           And then we also request the internal  
10          investigation that was done in this case. The records do  
11          indicate one was facilitated by in-house counsel and payment  
12          of the claim. This is an interesting one, in whether it's  
13          privileged or not privileged. And I'd like to write about  
14          that for you as well. We don't -- we think there's enough  
15          disclosure in the record to obviate any privilege.

16          And, finally, we've asked for communications with  
17          the FBI and Park Nicollet concerning Mr. Koch's role or lack  
18          thereof and confirmation from Park Nicollet that he received  
19          no kickback, which he didn't.

20          So those are our specific *Brady* requests. And  
21          then some of the -- like 9, 10, 11 are kind of the ones you  
22          usually have. I don't need to address those.

23          The third --

24          THE COURT: Again, the fighting issue on that is,  
25          Is it in their possession, right? I mean --

1 MR. ENGH: Well, then that's why I want to write  
2 about what they possess. I mean, they have complete access.  
3 This idea that is advanced by friend and esteemed counsel  
4 that we should just subpoena these things is a bit unfair to  
5 the defense. We'll be back here with quashing motions,  
6 because that's what they'll do, and I can't subpoena medical  
7 records anyway. So, you know, we should -- some of these  
8 things should just be ordered. They can comply under *Brady*.  
9 They have to give it to us. We don't have to subpoena.

10 THE COURT: Okay.

11 MR. ENGH: In terms of the in-camera review,  
12 again, the claim is that Kangas was paid for work, quote,  
13 unquote, he did not perform. This is -- quotes, he did not  
14 perform. This is from the government's brief at page 6. He  
15 did perform the work. And so we want to counter that  
16 erroneous claim, and we want to show the patients were  
17 indeed treated.

18 I've talked myself out on this motion. I think  
19 we've already argued the merits of it. We can limit it.  
20 But we really do need that evidence, and there's no other  
21 way I can get it. I can't subpoena it, and it's all  
22 privileged, and it would be extremely relevant for the jury  
23 to know that he actually performed the services he got paid  
24 for. I can't imagine a more relevant piece of evidence than  
25 that. And we -- our plan is not only to call the patients,

1 but to submit the records and also to submit their  
2 evaluations of how pleased they were with his work.

3 And I'm not arguing for Mr. Kangas, but  
4 Mr. Kangas' fate is tied to Mr. Koch's fate. And so they  
5 are charged together in this case; and how he goes, Mr. Koch  
6 goes as well. So they are both tied together in terms of  
7 the treatment of these patients.

8 In terms of the bill of particulars, you know, the  
9 gist of the charge is that Mr. Koch obtained, quotes, money  
10 or property within the meaning of the mail fraud statute, 18  
11 U.S.C. 1341. And I'm just trying to find out what money or  
12 property he obtained as a result of this scheme. And the  
13 government basically cut and paste their indictment into  
14 their memo. I appreciated reading it again, but it doesn't  
15 show what he gained in terms of money or property. And  
16 that's what I want. It's a very simple request. All they  
17 have to do is show me. I can't find it anywhere in the  
18 discovery. And all I got from the government is thousands  
19 of pages of credit card records that don't show that.

20 In terms of the 404(b) motion, we would appreciate  
21 21 days.

22 The *Jencks*. You know, this is a discussion we  
23 have in every case. This idea that you can do it three days  
24 before trial is imminently unfair and always has been. The  
25 government has relaxed that quite a bit. And I cited one

1 case where I -- it's the magazine case going on. We have  
2 *Jencks* a year before trial, and it's a great advantage for  
3 the government because it's caused like 40 guilty pleas  
4 already. So the idea that we're going to harass witnesses  
5 is just an anathema, and it's a great advantage to them. I  
6 don't think we're going to settle, but I don't understand  
7 the policy, frankly.

8 And I appreciate you're going to say that -- well,  
9 go ahead. I interrupt. I know what you're going to say,  
10 but say it anyway.

11 THE COURT: I'm going to say it. Okay? My  
12 understanding is it doesn't matter what I think or feel.  
13 What I understand is, the law is pretty clear, I cannot  
14 order disclosure of *Jencks* before the witness gets off the  
15 stand. That's point number one.

16 Is that -- that's what you thought I was going to  
17 say, right?

18 MR. ENGH: That's exactly what I thought you were  
19 going to say.

20 THE COURT: Now I will tell you this.

21 And Ms. Jones I don't think has been before me  
22 before, so she hasn't heard this, but I suspect you've heard  
23 it elsewhere.

24 There's a question as far as I can tell in the  
25 Eighth Circuit of whether *Jencks* trumps *Brady* or *Brady*

1 trumps *Jencks*. I have been clear in my orders that you  
2 can't withhold *Brady* information on the theory that it's  
3 also *Jencks* information and need not be disclosed until  
4 whenever they choose to disclose *Jencks* material.

5 Does this fall into or what part of what you are  
6 seeking falls into that category?

7 MR. ENGH: A lot of it does, mainly because  
8 Mr. Koch's role is so de minimis here and his reward is  
9 nothing, and there has to be reference to that in all those  
10 statements. It has -- it has to be there.

11 THE COURT: Okay. Okay.

12 MR. ENGH: I think the rough notes I'll submit on  
13 the record.

14 And I've said my peace. This is just a really  
15 interesting case where the civil law collides with the  
16 criminal law and --

17 THE COURT: Yeah.

18 MR. ENGH: And when the government adopts a case  
19 from a private corporation, sometimes it doesn't turn out  
20 too well. And when -- I mean, I'm not privy to everything  
21 the FBI did or what Ms. Jones did, but, you know, there's an  
22 inherent confirmation bias or at least fiscal bias in a case  
23 like this for Park Nicollet to pursue a prosecution without  
24 any cost, and that's troublesome, and that is what we  
25 believe is occurring here.

1 THE COURT: Hang on one second, Mr. Engh. Before  
2 you leave the podium, I want to make sure I don't have any  
3 other questions.

4 So as far as the bill of particulars, all you  
5 really want is for them to identify the property or the  
6 money. If that's the case, why isn't the assertion that  
7 they bilked HealthPartners out of \$505,000 -- why isn't that  
8 a sufficient disclosure of that?

9 MR. ENGH: Well, it doesn't prove his motive,  
10 which is always relevant. I mean, he's approving a fellow's  
11 pay and gets nothing back. I want to know if he got  
12 anything back. That would be proof of it. That would be  
13 proof of a major crime, but the fact that he gets nothing  
14 back is puzzling to me. In every other fraud case --

15 THE COURT: Got it.

16 MR. ENGH: -- the defendant gets something. They  
17 are claiming a great embezzlement where he doesn't embezzle  
18 anything.

19 THE COURT: Your argument on the bill of  
20 particulars is specific and exclusive to Mr. Koch?

21 MR. ENGH: Correct.

22 THE COURT: Got it. Okay. Thank you.

23 Ms. Jones. Let me actually start with a question  
24 to you that I probably should have asked Mr. Engh, but I am  
25 assuming this argument that you're standing in the shoes of

1 HealthPartners is a figurative statement. There is not some  
2 legal way in which you have somehow -- the government has  
3 somehow stood into the shoes of the victim company.

4 MS. JONES: To say the least, Your Honor.

5 THE COURT: Okay.

6 MS. JONES: The government disagrees with that  
7 statement, and its view is our job is to prosecute a crime  
8 that's been committed, and these defendants engaged in a  
9 crime. The government's not standing in the shoes of Park  
10 Nicollet. It's prosecuting two defendants who committed a  
11 crime, who misrepresented the work that was performed by one  
12 of them, acted in concert in executing a scheme for the  
13 purpose of receiving -- for the purpose of Mr. Kangas, in  
14 particular, receiving pay for work he did not perform. And  
15 but for Mr. Koch's execution of that by entering falsified  
16 work hours into Park Nicollet's time entry system on  
17 Mr. Kangas' behalf, Mr. Kangas would not have received that  
18 pay.

19 The court is correct in some of the questions with  
20 Mr. Engh regarding what the government's position is with  
21 respect to various items of discovery. As the government  
22 has articulated, we disclosed over 8,000 pages of discovery  
23 in this case. And to the extent that we have discovery that  
24 we believe is discoverable, we have turned that over to the  
25 defense and we will continue to do so; and we will continue

1 to ensure that to the extent we have something and they're  
2 entitled to it, they will get it. I just want to make that  
3 clear.

4 So, for example, Mr. Engh mentioned Mr. Kangas'  
5 evaluations for 2013 and 2014. We'll go back through our  
6 records to see if we can locate those. Obviously, if we  
7 have them, we will disclose them. But to the court's point,  
8 we can't disclose what we do not have.

9 THE COURT: Yeah, here's -- here's the question in  
10 my mind. First of all, I'm not -- maybe you are getting to  
11 it, but I'm not hearing you say that information is just  
12 none of your damn business, defendants, you know. Honestly,  
13 it seems pretty relevant to me, pretty important evidence.  
14 You're saying I don't have a dog in that fight, I don't have  
15 it, sort of bottom line, right?

16 MS. JONES: Yes, Your Honor. And I would just  
17 like to add the government did have the three evaluations,  
18 2015, 2016 and 2017, and we turned those over.

19 THE COURT: Right. I have no doubt that anything  
20 the government has, with the possible exception of *Jencks*  
21 material, has not been turned over -- has been turned over.

22 MS. JONES: Correct.

23 THE COURT: I think the frustration that the  
24 defendants have, in part, is you have, as a practical  
25 matter, unfettered and cooperative access to the victim



1 company. So if you need something or want to know  
2 something, you guys pick up the phone and you either get the  
3 documents or you get the information. And not stated by  
4 Mr. Engh, but sort of underlying all of this, I think is the  
5 unstated concern, you know it's there, you know what you are  
6 going to want and, lo and behold, you may have even gone and  
7 seen it, looked at it, and two weeks before trial you're  
8 going to say, hey, I'll take those documents now, and then  
9 you're going to dump them on the defendants, and they're  
10 going to be prejudiced. That I think is sort of the  
11 underlying concern here. And I think what you're saying is,  
12 I don't know if we're going to do that or not, but it  
13 doesn't matter, we're not doing anything we can't do; and if  
14 they want information, go get it.

15 MS. JONES: To the extent -- I'm sorry to  
16 interrupt, Your Honor.

17 THE COURT: No. Go ahead.

18 MS. JONES: To the extent we don't somehow obtain  
19 it, have it, and turn it over to them.

20 THE COURT: Right.

21 MS. JONES: But, I mean, it should not be lost in  
22 this discussion that the government takes its *Brady*  
23 obligation seriously. And so -- and I certainly understand  
24 why he's asking for those things, which is why we culled  
25 through to see if we had them and just inadvertently didn't

1 produce them, but we can't produce what we don't have.

2 And while you could say that the government has  
3 unfettered access, I'm not sure that that's exactly true  
4 either. We're not trying to surprise the defense with  
5 anything or hide anything from the defense in this regard.  
6 We're simply giving them what we have that we believe that  
7 they're entitled to.

8 The concern with the defense saying, well, judge,  
9 they can get this and this and this and this is the defense  
10 is now directing the government as to going off and doing  
11 its discovery and investigation for it. And the rules do  
12 not -- they are not structured for that, nor do they require  
13 that. And so the government's simply asking that it be held  
14 to the requirements under the rules.

15 THE COURT: So if -- let's assume I agree with you  
16 that you're -- you're not the defendants' investigator as it  
17 were. Do you have a view on -- you know, the other avenue  
18 here is what Mr. Engh is suggesting, which is I can issue an  
19 order to the victim company to turn over information. We'd  
20 see how that would play out. But do you -- are you taking a  
21 position? Do you want to take a position of whether I have  
22 the authority to do that?

23 MS. JONES: I mean, provided that the prerequisite  
24 sort of standard is met, I think it's true that the court  
25 might have that authority. You know, I'd rather not take a

1 position at the moment.

2 THE COURT: Understood. That's fine.

3 MS. JONES: But I just didn't want it to be lost  
4 that I -- I understand where the defense is coming from.  
5 The government has disclosed, as the court assumed, what is  
6 in its possession and will continue to do so, but  
7 significantly opposes the defendant being in the position of  
8 directing the government to investigate in the way that the  
9 defense deems appropriate.

10 THE COURT: Okay. Understood.

11 MS. JONES: With respect to the loss amount, the  
12 government's position in this case is that the defendant  
13 didn't do the work that he claimed he did. And while 10  
14 patients or 20 patients or 30 patients, whatever the number  
15 is, might come in and say, well, he did X for me, that  
16 doesn't prove that, with respect to the whatever number of  
17 hours remain, that he didn't work during that period of  
18 time. There's still a problem, that he's billed for time  
19 that he did not perform. And the defense has the evidence  
20 in its possession showing that there's no entry of patient  
21 information in the patient logging system that  
22 HealthPartners or Park Nicollet maintains by Kangas during  
23 substantial periods of time.

24 So Park Nicollet has a program. It's referred to  
25 as HDMS. I can't remember what that stands for at the

1 moment, but it is Park Nicollet's program for entry of  
2 patient-related data when a CPAP clinician interacts with a  
3 patient. There are two other similar-type databases. One  
4 is called AirView; the other is called U-Sleep. And each of  
5 those databases might generate a notification to a CPAP  
6 clinician, for example, that a patient is having difficulty  
7 with their machine, they are experiencing some delay of  
8 leakage, that sort of thing. So the CPAP clinician gets  
9 that information from those programs and initiates contact  
10 with the patient to say let's see if we can resolve whatever  
11 this issue is. And then when the person interacts with the  
12 patient, one of the things they go back and do is they put  
13 in patient notes into HDMS. So that's how the patient  
14 information moves from the clinician back to the  
15 institution, so the institution knows what the clinician is  
16 doing.

17 THE COURT: Let me interrupt you for a second.  
18 Correct me if I'm hearing this wrong, but what I'm hearing  
19 you say is that in this HDMS --

20 MS. JONES: Correct.

21 THE COURT: I hate these masks.

22 MS. JONES: It's hard.

23 THE COURT: -- in the HDMS system Mr. Kangas or  
24 Mr. Koch, whoever is entering the data, would, in a perfect  
25 world, he would say, At this date on this date at this time

1 I performed this service for this patient. And what I'm  
2 hearing the government say is our proof of the fraud is that  
3 in the HDMS database what we have is, On this date at this  
4 time I performed this amount of time in service within the  
5 scope of my employment, but doesn't name a patient.

6 MS. JONES: No, that's not what the government is  
7 saying.

8 THE COURT: Okay.

9 MS. JONES: What is clear is that Mr. Kangas did  
10 not include any patient interaction information in HDMS for  
11 substantial periods of time --

12 THE COURT: But --

13 MS. JONES: -- during which he was paid.

14 THE COURT: Right, but what they're saying is, So  
15 what; that doesn't mean he didn't actually do the work;  
16 okay, he's really lousy at billing and really lousy at  
17 recordkeeping, but he didn't -- he performed the service.  
18 And you are saying, No, no, no; this is evidence that he  
19 didn't.

20 MS. JONES: That's some evidence that he didn't.

21 THE COURT: Okay.

22 MS. JONES: It's not the only evidence that he  
23 didn't.

24 THE COURT: Right.

25 MS. JONES: Yes.

1 THE COURT: So I'm kind of back to my question  
2 that Mr. Engh didn't like for some reason, I don't think,  
3 which is, Don't you have to -- when you come to the trial of  
4 this case, do you not have to show you billed on this date  
5 for this service and no service was rendered? And  
6 doesn't -- if the government can't say -- well, the  
7 government's going to say no service was rendered. But  
8 doesn't he get to say, Sure, there was, but, okay, I suck at  
9 recordkeeping, I don't know which patient it was.

10 MS. JONES: I mean, he could say that. He could.

11 THE COURT: Okay.

12 MS. JONES: But saying that you performed work,  
13 but not in any way whatsoever recording that work consistent  
14 with your employer's protocols, policies and procedures, I  
15 mean, you could be performing magic too.

16 THE COURT: Can you give me -- and maybe this  
17 doesn't matter to this motion. But can you give me any  
18 sense of what information is entered in the HDMS system that  
19 relates to where you say the services weren't performed? In  
20 other words, what was there?

21 MS. JONES: In terms of the universe of  
22 information?

23 THE COURT: Yeah. If we just assume, you know,  
24 that on a particular date at a particular time Mr. Kangas  
25 claims he performed an hour of work, but the HDMS system

1 doesn't contain at least everything that the employer would  
2 require for that date and time, what does it contain or does  
3 that vary a lot?

4 MS. JONES: It does vary a lot.

5 THE COURT: Okay.

6 MS. JONES: It's patient specific, but it's  
7 patient information. It's the nature of issues that a  
8 patient is having with a CPAP machine. It's the method or  
9 manner of addressing that that the CPAP clinician employs in  
10 the hopes of resolving whatever the issue is. It's any sort  
11 of follow-up that might be necessitated or indicated from  
12 their interaction, among other things.

13 THE COURT: And the fraudulent entries -- I'm just  
14 going to call them that, so we're talking on the same  
15 page -- what information do the fraudulent entries contain?

16 MS. JONES: The fraudulent entries, there is no  
17 information where the fraudulent entries are concerned.  
18 It's because he didn't do the work.

19 THE COURT: Well --

20 MS. JONES: He's not lying on the -- in terms of  
21 the information that he's inputting.

22 THE COURT: Right. No. What I'm trying to get  
23 at -- correct me if I'm not following. Okay? But at least  
24 what I've understood from the two of you is in order to get  
25 paid --

1 MS. JONES: Oh, I'm sorry.

2 THE COURT: -- they got to put in this  
3 information.

4 MS. JONES: Got it.

5 THE COURT: And it generates pay for these  
6 services.

7 MS. JONES: Okay.

8 THE COURT: And the fraudulent entries that  
9 generated pay, there's got to be at least something there in  
10 order to generate the pay. So what's there?

11 MS. JONES: I'm sorry. I was talking about HDMS,  
12 and you were talking about the time entry system.

13 THE COURT: Okay. I didn't realize that. Thank  
14 you.

15 MS. JONES: Okay. What Mr. Koch then did was,  
16 independently of the patient work or absence of work,  
17 Mr. Koch entered into Park Nicollet's time entry system  
18 certain numbers of hours that Mr. Kangas allegedly worked  
19 that Mr. Kangas did not work and Mr. Koch was well aware  
20 that Mr. Kangas did not work.

21 THE COURT: And at least one part of the evidence  
22 of that is we have the time entry system saying X and the  
23 HDMS system just not reflecting that at all?

24 MS. JONES: It could be the HDMS system. It could  
25 be other records from Park Nicollet that do not gel with a



1 12-hour day that was entered for Mr. Kangas on a particular  
2 day.

3 THE COURT: Okay. All right. I'm with you.

4 MS. JONES: Okay. With respect to the other  
5 motions, there are various things that I could talk about,  
6 Your Honor, that are sort of specific.

7 Obviously, to the extent that there is *Jencks*,  
8 we'll turn over grand jury transcripts, things of that  
9 nature.

10 We just don't think that for all the reasons I put  
11 in my response that the court needs to conduct an in-camera  
12 review.

13 And, Your Honor, the government believes that the  
14 defense is asking for a bill of particulars precisely for  
15 the reason that a bill of particulars is not permitted, and  
16 that's as a discovery device.

17 THE COURT: Well, let me ask you on that one.  
18 They're asking -- they're saying, okay, you got to tell us  
19 what Mr. Koch received here. It's not in the indictment.  
20 It's not in the records turned over. So we need to know  
21 what your assertion is about what he received. That's what  
22 I understand their argument to be.

23 MS. JONES: As do I.

24 THE COURT: So if that's -- if he's right that  
25 that's not anywhere, are they entitled to the information?

1 It seems to me they are, but tell me if they are not. And  
2 if they are, how do they get it if it's not in discovery?

3 MS. JONES: What the government -- the elements of  
4 mail fraud are the existence of a scheme to defraud, you  
5 know, in order to gain money or property. I can't think of  
6 all the others now, but that's the gist of the one that I  
7 want to focus on.

8 THE COURT: Right. And it's the gaining of the  
9 money or property that they're asking.

10 MS. JONES: And the money or property is half a  
11 million dollars paid to Mr. Kangas. Not every member of  
12 a -- not every member of a fraud scheme necessarily gets  
13 some kickback related to that fraud scheme. There are all  
14 sorts of motivations, things that motivate people to engage  
15 in fraudulent behavior, and the law does not require that.  
16 The government is not required to prove that.

17 THE COURT: So another way of saying that is  
18 Mr. Koch aided and abetted Mr. Kangas actually getting the  
19 money; we're not sure why he did it or it doesn't matter why  
20 he did it, he did it, and it doesn't matter whether he got  
21 any money himself.

22 MS. JONES: That's one formulation. In this  
23 instance but for Mr. Koch, Mr. Kangas could not have gotten  
24 the money.

25 THE COURT: Because Mr. Kangas can't enter the pay

1 information into the time entry system.

2 MS. JONES: Well, he could have, but Mr. Koch was  
3 his supervisor, so he approved all of those time entries.

4 THE COURT: Okay. Okay.

5 MS. JONES: And unless the court would like me to  
6 address something else specific, I'll rest on my pleadings.

7 THE COURT: Okay. Very well. I don't think I  
8 have any other questions of you.

9 MS. JONES: Okay.

10 THE COURT: Okay. Do you wish to have a brief  
11 rebuttal, Mr. Engh?

12 MR. ENGH: A couple of points.

13 The government may have given us 8,000 documents,  
14 that's true, but in our review of it maybe 20 to 50 matter.  
15 And this is -- this is the new protocol in the justice  
16 department. We get millions of documents, and what you are  
17 looking for is a proverbial needle in the haystack; and what  
18 I'm looking for is what he got out of it, for example, or  
19 the treatment of patients, for example. So the confusion  
20 here is I give you 8,000 pages that really is meaningless to  
21 us. That's why we have discovery motions.

22 In terms of the, you know, the services rendered  
23 by Mr. Kangas, these were not in turn billed to Medicare.  
24 This was a service. This was a flat service given to the  
25 customers of Park Nicollet. So it wasn't -- he got paid for

1 it, he didn't have to pay someone else, he didn't seek  
2 compensation, which may explain some of the records, but we  
3 have an explanation for the records at trial, which we will  
4 not disclose now.

5 And in terms of the bill of particulars, you know,  
6 it does go to Mr. Kangas' intent that he didn't get anything  
7 out of this. And it's really a simple question. I mean,  
8 say that he didn't get anything out of it. Yes or no.  
9 That's all they have to do. And they refuse to do it for  
10 some reason, and I don't understand why.

11 THE COURT: Okay. All right. So, Mr. Engh, I do  
12 want you to file some further written argument on these  
13 points. Okay? How much time do you need?

14 MR. ENGH: At least two weeks would be helpful.

15 THE COURT: Okay.

16 MR. ENGH: We don't have a trial date set, and I  
17 think we are behind anyway on trials, so --

18 THE COURT: I think we are.

19 MR. ENGH: Yeah.

20 THE COURT: Right. I do want you to specifically  
21 address in your written submission, you know, what authority  
22 I have to order material directly from the victim company.  
23 Okay?

24 MR. ENGH: Okay.

25 THE COURT: And anything else you think that we've

1 discussed today that will be helpful to me, please do.  
2 Today is the 6th. Let's say the 21st for your submission.  
3 Okay?

4 MR. ENGH: Great. Thank you.

5 THE COURT: Okay. Thank you.

6 Ms. Jones, how much time do you need to respond to  
7 Mr. Engh's submission, assuming you want to?

8 MS. JONES: I assume I will want to and I'd ask  
9 for 10 to 14 days.

10 THE COURT: All right. So May 21 for the  
11 defendants' submission. Two weeks from that will be I think  
12 approximately June 4th.

13 MS. JONES: Okay.

14 THE COURT: So whatever that Friday is, your brief  
15 would be due. Okay?

16 MS. JONES: Okay. Okay. Thank you, Your Honor.

17 THE COURT: Okay. Thank you.

18 So is there anything further today for the  
19 government?

20 MS. JONES: No, Your Honor.

21 THE COURT: Okay. Thank you.

22 Anything further today for the defendants,  
23 Mr. Engh?

24 MR. ENGH: Not for Mr. Koch, no.

25 THE COURT: Okay. Mr. Friedberg or Pacyga?

1 MR. PACYGA: Yes. Thank you, Your Honor.

2 THE COURT: Okay. Go ahead.

3 MR. PACYGA: Good morning, Your Honor. Ryan  
4 Pacyga for Mr. Kangas.

5 First, the defense has basically joined and  
6 mirrored the motions that Mr. Engh had filed on behalf of  
7 Mr. Koch, but for the bill of particulars. We are not  
8 asking for that.

9 THE COURT: Right.

10 MR. PACYGA: And the flavor of this case is really  
11 sort of a civil litigation case. We're dealing with  
12 acronyms and names of systems, for example. Who is going to  
13 be familiar with those? Well, the defendants to a degree.  
14 How these systems operate? They may have limited knowledge.  
15 Who is going to know that? Park Nicollet. Who else is  
16 going to know that? The government by virtue of its working  
17 with Park Nicollet and their lawyers. The government is in  
18 the best position to obtain this information.

19 And the frustrating thing in cases like this is  
20 that -- and I'm not accusing Ms. Jones of this, but it's  
21 certainly possible for the government in this competitive  
22 environment we are in, for example, which is the same reason  
23 that search warrants require a neutral and detached  
24 magistrate, the reason is the case law says that law  
25 enforcement is a competitive environment and to ferret out

1 or to screen off and protect from that we want a neutral and  
2 detached magistrate. If we get into this situation with  
3 Park Nicollet, their lawyers aren't going to want to give up  
4 some of this information. And the government, of course,  
5 may have a different view of indeed what is *Brady*  
6 information. It's certainly -- we all can think of examples  
7 where the defense thinks something is *Brady* information or  
8 relevant, if you will, that the government will take the  
9 position that it's not.

10 And the court hit the nail right on the head when  
11 you discussed potentially that problem of, Is it *Jencks* or  
12 is it *Brady*. I think the problem is two levels. You  
13 identified one level of it. Right? And the problem is, Can  
14 the government characterize it as *Jencks* and give a late  
15 disclosure on it and sort of hold their cards that way, and  
16 what would that do to the defendants' right to due process  
17 and fair trial?

18 The second issue is not only how they -- how they  
19 want to characterize it, okay, but, frankly, perhaps even a  
20 mistaken view, because sometimes in the worst-case scenario  
21 the government can get creative and articulate a reason why  
22 something is *Jencks* and not *Brady* and argue it that way.  
23 But the other problem is, is that, of course, we're dealing  
24 with human beings. All right. And they look at things, the  
25 government looks at things from a difference lens.

1 Sometimes this isn't even intentional. But under even their  
2 good faith efforts, they might look at evidence and say this  
3 is *Jencks*, this is not *Brady*, or it's not relevant, even  
4 under their best intentions, if they look at it from a *Brady*  
5 lens. But you can see why, for example, in motion hearings  
6 and in suppression hearings, if you will, sometimes the  
7 court can list a number of factors why there might be other  
8 reasonable inferences for things that could favor the  
9 defense. So even under the best of intentions. And then  
10 what do we get to? What do we get to if the government  
11 looks at some of this information under the good faith  
12 efforts of a *Brady* lens instead of a *Jencks* lens for a  
13 minute and they say, well, we just -- we don't think that's  
14 discoverable. I would submit to you that I doubt Park  
15 Nicollet's lawyers are going to look at it with that lens.  
16 They are going to look at in protecting the financial  
17 interests of and perhaps the confidential interests of Park  
18 Nicollet internally.

19 THE COURT: So what's the solution to that? At  
20 least as you pose it, let's say the government is sitting on  
21 a stack of, you know, witness statements that they have  
22 reviewed and they say there's just no *Brady* information  
23 here. You say, well, I don't know if there is or there  
24 isn't. What's the solution?

25 MR. PACYGA: Well, one, but unfortunately, and I



1 know the court -- I mean, we may be asking for more than the  
2 court wants to bite off, but in-camera review is a good  
3 vehicle for that. That's a neutral and detached magistrate,  
4 with the idea that, again, a different view might be helpful  
5 even under the best of good faith intentions by the  
6 government, number one.

7 And the earlier -- I mean, this case is going to  
8 involve a lot of documents, probably a lot of witnesses,  
9 foundational witnesses. I mean, a jury is going to be  
10 hearing about acronyms, about things we've been discussing  
11 today. HDMS. What does that mean? What's this billing  
12 system? I mean, you can imagine that it goes on and on.  
13 And the more out-front we are of these issues, the cleaner a  
14 trial is going to go. We're going to have hiccups on  
15 foundation, on witnesses, on squabbling over the  
16 admissibility of documents at trial, you know, where we're  
17 right up against a trial, and that's not in the best  
18 interests of any party in a case like this.

19 So this is why I think it's also important for the  
20 court to closely examine about whether it's proper for the  
21 court to order the government to get -- to get this  
22 information. And if the government gets all of it, if you  
23 will, about what we're asking for in our discovery requests,  
24 and it has, for example, a question about, well, perhaps  
25 this is or isn't, I, number one, I think it's best that they

1 error on the side of *Brady*, on a *Brady* analysis, because the  
2 results -- I mean, we could be back at a new trial if they  
3 don't, at best, frankly, for the government. At worst, the  
4 defendants are -- his indictment is dismissed. So I want to  
5 head those problems off at the pass and just have a candid  
6 discussion about that with the court and how we're looking.  
7 I think we're looking at this that way.

8 In addition, it's tempting because of this  
9 competitive enterprise, if you will. And, again, I'm not  
10 saying Ms. Jones would do this, but the reality is as much  
11 as the government has as *Brady* obligations lawyers get  
12 invested in the cases they have. And Park Nicollet's  
13 lawyers are going to -- they're going to be there. Park  
14 Nicollet's lawyers I foresee will be the guides, if you  
15 will, like if you go hire a guide to walk you through an  
16 area. Right? They've got to orient you to it. Ms. Jones  
17 isn't going to know where to go exactly to get what they  
18 need from Park Nicollet, if the court directs any of this.  
19 They are going to have to rely on the people at Park  
20 Nicollet to take them there. And the temptation is, of  
21 course, that let's not get some of these records in this  
22 certain place.

23 For example, what I'd really like to see is these  
24 budget meeting minutes. I mean, we've got five years of  
25 bills and time going into Park Nicollet, five years, where

1 they're paying Mr. Kangas. Five years the government says,  
2 well, he was submitting this -- these bills that Mr. Koch  
3 was entering, and these call records from these clients,  
4 these patients don't match up. Are we to believe that a  
5 company like Park Nicollet with how many accountants and  
6 controllers and layers of managers and budgeting meetings  
7 and that is just simply not going to be aware of this for  
8 five years, when apparently the whole time they've had the  
9 records to compare and contrast Mr. Kangas' time with the  
10 call logs from these patients, and for five years they just  
11 didn't see this? Did these discussions come up at meetings  
12 and budgeting with higher-level managers that wouldn't have  
13 even been to the knowledge of Mr. Koch? Were there internal  
14 memoranda or emails between managers and accountants and  
15 those sorts of things talking about these issues? Wouldn't  
16 that be relevant to the defense? Wouldn't that be sort of a  
17 waiver, if you will, if Park Nicollet was aware of these  
18 things and said that's fine, we don't need him? What if  
19 there's an email, for example? We don't know this. And  
20 that's the problem in the *Ritchie* or *Perry* cases in state  
21 court, if you will, is, well, the defense, what do you want?  
22 Well, the problem is we want something like this, but we  
23 can't tell you exactly if it exists or if it's there because  
24 we don't have it. They would have it if it exists. But  
25 wouldn't it be relevant, and wouldn't it be exculpatory, and

1 wouldn't it be *Brady*? For example, if there are internal  
2 memoranda or emails or sometimes companies have IMs, instant  
3 messages, some of them are preserved, some of them aren't.  
4 Okay. But maybe they're -- I mean, if I'm a manager of Park  
5 Nicollet and I'm seeing -- for example, what if there was a  
6 jump in pay from whoever had the position before Mr. Kangas,  
7 right, and all of a sudden the pay goes way up? Is somebody  
8 not realizing that at Park Nicollet? And if they are, we  
9 know there's going to be a discussion about that, whether  
10 it's a meeting memoranda, internal emails, discussions  
11 between higher-level managers or accounting or what have  
12 you. That stuff has to be there. And if it's not there,  
13 the defense needs to know that as well. Everybody needs to  
14 know that in this case if we're going to get at the truth.  
15 These are the sorts of things we need, and I don't trust  
16 that Park Nicollet's lawyers are going to go get it for us.  
17 And I don't think -- I think that the vehicle there is that  
18 the government, frankly, be ordered to go get it and get to  
19 these things.

20 I assume that the government wouldn't want to  
21 prosecute its case the same way or continue forward if that  
22 sort of evidence existed. I assume the government would  
23 have serious concerns if that evidence turned up. I would  
24 hope they would. I don't know that they know that. We  
25 don't know that they've sought that or not. We need to know

1       these things or we've got a big problem on our hands. And  
2       that's -- that's just something for -- that's an example of  
3       why we need these things. And I could come up with probably  
4       30 different things I'd want on that, you know, but that  
5       gives the court the flavor of why I have serious concerns  
6       about these things.

7               And you can get in a situation where a party,  
8       whether it's Park Nicollet or the government or Park  
9       Nicollet deceiving the government even, if they want to  
10      cover their own selves here, because they've got a hefty  
11      restitution claim here, could say, well, let's put our head  
12      in the sand; we'll look behind door number one and door  
13      number two, but we don't want to go here; and, frankly, we  
14      might not tell the government that it exists, we don't want  
15      to -- if they're not going to ask us. So we need to -- we  
16      need to knock on all these doors, we need to turn over every  
17      stone here, because if evidence of that flavor exists,  
18      that's going to do a lot to turn the case for the  
19      defendants, in my opinion.

20             THE COURT: Well --

21             MR. PACYGA: The court -- go ahead.

22             THE COURT: If this were a civil case, these would  
23      be -- probably shouldn't say it this way -- these would not  
24      be difficult questions for me. You know, the big issue for  
25      me is, you know, to what extent can the government be made

1 to do what you are suggesting, right, be the agent, if you  
2 will, for getting information from Park Nicollet and if  
3 not -- or HealthPartners, whichever it is; and if the  
4 government is not that agent, what authority do I have to  
5 tell Park Nicollet turn it over? You know, those are the  
6 big issues in my world, you know. I mean, I well appreciate  
7 the issue you have, and, you know, my problem is, you know,  
8 what gets done about it and how and what's -- what's my  
9 authority to do it.

10 MR. PACYGA: I understand that. At a minimum we  
11 have a record right here and now of the *Brady* concerns that  
12 the defense may have. And I would hope that the  
13 government -- well, Mr. Engh will be briefing this issue,  
14 and so we'll have to look at -- we'll be helping him, of  
15 course.

16 THE COURT: Right.

17 MR. PACYGA: And that is a question that we're  
18 going to have to answer, but at the same time there are  
19 requirements, if you will, under the law, perhaps, but the  
20 overarching concern regardless perhaps of what the discovery  
21 rules ought to be in this courthouse and in this district  
22 ought to be, you know, finding *Brady* evidence if it exists,  
23 whether or not a requirement is there. These are just  
24 fundamental questions in this case. The government has the  
25 ability with or without a court order to go to Park Nicollet

1 and say, yeah, we need to take a look at these things. And  
2 I think it's -- I think we have generally a good flavor for  
3 the United States Attorney's Office in this district where  
4 oftentimes they'll undertake to do those things. And I  
5 would hope that the government hears us loud and clear right  
6 now, because now we've got a record of what these concerns  
7 are, and they are on notice. They are on notice by what I'm  
8 saying here now.

9 So the other question, for example, along that  
10 flavor is the government saying, well, there's patients'  
11 information where they're calling into the company at times.  
12 Sometimes they'd be calling Mr. Kangas' phone. I don't know  
13 if Park Nicollet even had a record of that happening or not.  
14 But to the extent, for example, that these patients are  
15 calling Park Nicollet and saying I've got a problem with my  
16 CPAP machine, all right, and then they're saying there's no  
17 record of a follow-up from Kangas, well, are there records  
18 of follow-ups from these patients again? Why don't we have  
19 those records? Because what's the inference if the patient  
20 doesn't call back the next day? One inference is that  
21 Mr. Kangas helped them. So why don't we -- we should  
22 probably have those records and the records of those  
23 patients so we can follow up on them.

24 THE COURT: Where do those records exist? Are  
25 those -- is it your --

1 MR. PACYGA: Park Nicollet is what the government  
2 was saying -- for example, they said if he helps 10, 20, 30  
3 patients, then they know that some of these calls are coming  
4 in, you know. I don't know if there are records if they  
5 called directly to Mr. Kangas, but --

6 THE COURT: My question was a little different.

7 MR. PACYGA: I'm sorry.

8 THE COURT: Are those, in your understanding, are  
9 those in patient charts? Or is there some other place where  
10 that -- if a patient calls and says my CPAP machine is not  
11 working, where does that get logged or charted as it were?

12 MR. PACYGA: Well, and that's part of the problem,  
13 is I don't think we know. I mean, our clients can tell us  
14 some things, but, again, they're one small part of the  
15 operation, and even the CPAP operation is bigger than these  
16 two guys. They had a very distinct role, if you will. So  
17 this is another reason why we get back to the discovery  
18 issues that we have. That's a good question. We want to  
19 know that too. You know who knows? Park Nicollet. You  
20 know who can get it? The government. That's where we are  
21 at and that's why we have these concerns, respectfully.  
22 But, I mean, I wanted to drive that point home because these  
23 things are important in this case. And it's not very fair,  
24 if you will, it feels like, if the government or Park  
25 Nicollet's lawyers say again, well, we want to go -- we are



1 going to give you these things, right, here's what it is.  
2 There may very well be some other things here that we don't  
3 want to give up, but we're just not going to open that door,  
4 we're not going to go there, we're going to put our head in  
5 the sand about that, but that's not fair. That's where  
6 we're at. And let's get real about what's going to happen  
7 if we have to subpoena Park Nicollet financially for these  
8 two? That becomes a very unfair fight. And this is -- I  
9 think there's *Brady* things in there. And I don't know that  
10 these two people should have to spend who knows how much  
11 kind of money fighting Park Nicollet and their lawyers and  
12 dragging out this litigation. There may very well be *Brady*  
13 information in there, and everybody is on notice right now  
14 that that might be there, and I think the right way to do it  
15 is just to go get it now. Why would we even want to  
16 entertain those kind of problems later? Why would the  
17 government want to proceed with the case if they don't know  
18 this information? I'm hearing that they've given us what  
19 they have. So I don't think -- if that's true, I don't  
20 think they know this either. And that shouldn't be  
21 happening in this courtroom.

22 Thank you.

23 THE COURT: Thank you, Mr. Pacyga.

24 Ms. Jones.

25 MS. JONES: Your Honor, as I said before, the

1 government takes its *Brady* obligations very seriously. And  
2 the suggestion that there's a *Brady* issue I'd like to  
3 address, because there's no specific *Brady* issue before the  
4 court today. There are all sorts of hypotheticals that have  
5 been lobbed at the court that could potentially raise *Brady*  
6 issues, but there's no *Brady* issue that's been brought to  
7 the court. And I want the record clear about that so that  
8 there's no ambiguity.

9 In addition to that, when it comes to this  
10 balancing, is it *Jencks*, is it *Brady*, the government's view  
11 with respect to that is it is not in our interests or any  
12 case that we prosecute to error on the wrong side of that.  
13 It is always in our interest to, out of an abundance of  
14 caution, assume that it might be construed as *Brady* and  
15 disclose, because there's no harm making that decision as  
16 opposed to the opposite decision. And that is -- that is  
17 the path the government always takes, at least I do, and  
18 that's the path this prosecution has taken and will take  
19 leading up to the trial.

20 There are lots of things that Mr. Pacyga said  
21 about, for example, budget meetings, what if there are --  
22 you know, what happened at these budget meetings and Park  
23 Nicollet didn't know that. At the end of the day frauds  
24 continue because people don't know that somebody is lying to  
25 them. And that's what happened here. There might be budget

1 meetings. There might be budget meetings talking about  
2 numbers. That doesn't address whether someone lied about  
3 whether they were performing the work for which they got  
4 paid. So, sure, there could be budget meetings. There  
5 probably were budget meetings. That doesn't mean that the  
6 salary of a part-time CPAP clinician of an institution such  
7 as Park Nicollet/HealthPartners would ever be discussed.  
8 Frankly, I wouldn't expect it to be discussed. I certainly  
9 wouldn't expect it on a particular clinician who is a  
10 part-time clinician to be discussed at a large budget  
11 meeting. That would be unusual for an institution of that  
12 size.

13 Again, unless the court has specific questions,  
14 I'll rest on my written response to the motion or motions,  
15 and I will respond once the defense files their --

16 THE COURT: You'll respond in kind, right?

17 MS. JONES: Yes.

18 THE COURT: All right. I don't have questions.

19 I guess, you know, I'll leave you both with this  
20 comment or observation. On the *Brady* issue, the big legal  
21 question in my mind is, Are these materials that have not  
22 been reviewed presently in the possession of the government.  
23 That strikes me as the legal issue. Right? So I guess I'll  
24 be further enlightened on that.

25 All right. These motions are submitted.

1 I hesitate to ask, but anything further now?

2 MS. JONES: No, Your Honor. Thank you.

3 THE COURT: All right. Let me ask you one thing.  
4 What is the trial date in this case?

5 MS. JONES: It has not been set --

6 THE COURT: It has not been set.

7 MS. JONES: -- because of the master calendar, I  
8 assume. And so they'll get to us once they get the folks  
9 who are in custody --

10 THE COURT: Do you have visibility to the master  
11 calendar such that you know whether you are on it?

12 MS. JONES: I know -- I know to date we are not on  
13 it. Well, I can't say I know that. Here's what I'll say.  
14 No trial date has been scheduled. I don't have any  
15 visibility about whether that's -- we're on it somewhere.  
16 We just have not been notified of a date.

17 THE COURT: Okay.

18 MR. PACYGA: I just was going to offer, if I may,  
19 Your Honor, that to the extent we get down this road with  
20 the discovery and there's more discovery on some of these  
21 things we are asking for, the defense -- we would be  
22 agreeing to a protective order, of course, for those  
23 matters. They probably have internal ops information at  
24 Park Nicollet and certainly patient information and that.  
25 For what it's worth.

1 THE COURT: Okay. Thank you, Ms. Jones.

2 All right. Anything further for either of the  
3 defendants?

4 MR. ENGH: No, Your Honor. Thank you.

5 MR. PACYGA: No. Thank you, Your Honor.

6 THE COURT: All right. Well, so we're off the  
7 record. Then those motions are submitted.

8 (Court adjourned at 10:24 a.m., 05-06-2021.)

9 \* \* \*

10 I, Renee A. Rogge, certify that the foregoing is a  
11 correct transcript from the record of proceedings in the  
12 above-entitled matter.

13 Certified by: /s/Renee A. Rogge  
14 Renee A. Rogge, RMR-CRR

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